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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 699

FAR EAST CONFERENCE, NORTH ATLANTIC BALTIC FREIGHT CONFERENCE, NORTH ATLANTIC MEDITERRANEAN FREIGHT CONFERENCE, NORTH ATLANTIC UNITED KINGDOM FREIGHT CONFERENCE, NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE, AND NORTH ATLANTIC FRENCH ATLANTIC FREIGHT CONFERENCE,

Petitioners,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

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Petitioners,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, dated August 20, 1964, and the judgment entered thereon, affirming orders of the Federal Maritime Commission dated December 19, 1963.

Citations to Opinions Below

The Court of Appeals' opinion and decision, not yet reported, are printed, *infra*, Appendix A.

Jurisdiction

The decision of the Court of Appeals was handed down and judgment thereon entered on August 20, 1964. The jurisdiction of this Court is invoked under § 10 of the Judicial Review Act (Federal Agencies), 64 Stat. 1132 (5 U.S.C. § 1040) and 28 U.S.C. § 1254.

Questions Presented

1. Do the Federal Maritime Commission's demands for information in the orders under review relate to subjects over which it has jurisdiction?

2. Are the Commission's orders authorized by § 21 of the Shipping Act, 1916, as amended, and § 6 of the Administrative Procedure Act?

3. Do the Commission's orders contain a statement of purpose sufficient to permit a determination of the relevancy and reasonableness of the information sought, and, therefore, to satisfy the requirements of Amendment IV to the Constitution of the United States?

Statutes Involved

The constitutional and statutory provisions involved are: Amendment IV to the Constitution of the United States; §15 of the Shipping Act 1916, 39 Stat. 733, as amended by 75 Stat. 763 (46 U.S.C. §814); §17, Shipping Act, 1916, 39 Stat. 734 (46 U.S.C. §816); §18(b)(5), Shipping Act, 1916, as amended, 75 Stat. 765 [46 U.S.C. §817(b)(5)]; §21, Shipping Act, 1916, 39 Stat. 736 (46 U.S.C. §820); §212(e), Merchant Marine Act, 1936, 49 Stat. 1990 [46 U.S.C. §1122(f)]; §§2, 4 and 10 of the Judicial Review Act (Federal Agencies), 64 Stat. 1129, as amended, 1130 and 1132 (5 U.S.C. §§1032, 1034 and 1040); and §5 of the Administrative Procedure Act, 60 Stat. 240 (5 U.S.C. §1005). Because these provisions are lengthy, they are set forth in Appendix B.

Statement

Petitioners (hereinafter, the "Conferences") are rate-making associations of common carriers by water in the foreign commerce of the United States, operating under agreements approved by the Federal Maritime Commission or its predecessor agencies pursuant to § 15 of the Shipping Act, 1916, as amended, 75 Stat. 763 (46 U.S.C. § 814).

Pursuant to these agreements the Conferences establish tariffs of ocean freight rates, which are filed with the Commission in accordance with § 18(b)(1) of the Shipping Act. The member carriers undertake to assess and apply these rates on cargoes carried by

them in the export trades from the United States covered by the respective conference agreements.

On December 19, 1963, the Federal Maritime Commission issued orders, purportedly under § 21 of the Shipping Act, 1916, which were served upon the Conferences on December 24, 26 and 27, 1963. (R. 24, 75, 135.)[1] Part I of these orders demanded that the Conferences, as separate entities apart from their common carrier members, provide detailed information as to rate-making activities. These orders did not arise out of any proceeding instituted by way of complaint or on the Commission's own motion, as provided in § 22 of the Shipping Act, 1916, 39 Stat. 736 (46 U.S.C. § 821), but bore the otherwise unidentified and unidentifiable label of "Foreign Trade Study" with a specific number. They were likewise totally unrelated to any proposal for drafting new legislation.

The Commission's orders roughly paraphrased several sections of the Shipping Act, 1916, 39 Stat. 728, as amended (46 U.S.C. §§ 801 *et seq.*) and one section of the Merchant Marine Act, 1936, 49 Stat. 1990 [46 U.S.C. § 1122(f)]. Then, in the only portion which might be claimed to constitute a statement of purpose, they provided:

> "In order that the Commission may be properly informed as to matters bearing upon its responsibilities under these statutory provisions, and to determine what action if any it should take pursuant to such statutory provisions, it is necessary

[1] References marked "R." are to pages of the Joint Appendix constituting the record in the court below, copies of which are being filed in this Court.

> that the conference and the carriers named herein furnish the Commission with the information hereinafter specified."

The Conferences were both puzzled and disturbed. The failure to state any comprehensible purpose would itself have made the orders vulnerable under previous decisions. The only possible clue to the Commission's purpose was an accompanying communication from the Commission's Chairman. (R. 12, 73, 130.) This letter, after referring to "disparities" between the Conferences' outbound rates and the inbound rates of other conferences concerned with reciprocal trades, requested the Conferences to take immediate steps to adjust outward rates to inward rates. Failing such adjustment, the Conferences were called upon to furnish a full justification of so-called "disparities". The letter concluded:

> "For the purpose of evaluating your statement and determining whether formal proceedings should be instituted, the Commission is also requiring that you furnish the information described in the accompanying order issued pursuant to section 21 of the Shipping Act, 1916."

If this be considered a statement of purpose, *dehors* the order, the purpose was to impeach or corroborate a purely voluntary explanation of rates not yet in existence.

The Conferences and others affected filed motions for reconsideration and vacation of the so-called Section 21 orders. (R. 30, 99, 149.) In these motions they pointed out that the orders contained no statement of purpose, no valid objective and nothing to which the

documents could properly be related. They also pointed out that if, contrary to the letter of the Commission's Chairman, the purpose was to determine whether the Conferences' rates were too high or too low under Section 18(b)(5) of the Shipping Act, 1916, as amended, 75 Stat. 764 [46 U.S.C. §817(b)(5)], the demands were unauthorized and irrelevant, for they related to the rate-making process rather than to the effect of the rates—the only question open under the amendment to the statute.

All of these motions were denied by the Commission's order dated February 7, and served February 26, 1964. (R. 33, 111, 160.)

Because the consequences of compliance with the Commission's orders were of far-reaching importance, the Conferences filed review petitions in the Court of Appeals for the District of Columbia Circuit under §§2 and 4 of the Judicial Review Act (Federal Agencies), 64 Stat. 1129, 1130 (5 U.S.C. §1032 and 1034). (R. 40, 118, 167.) The Court of Appeals denied petitioners' applications for stay and interlocutory injunction under date of March 12, 1964, with Judge Burger dissenting.[2] The cases were argued and, on August 20, 1960, the Court rendered an opinion (Appendix A) in favor of the Federal Maritime Commission, Judge Miller dissenting.

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[2] This order was made in Cases Nos. 18,468 and 18,471 in the court below. (R. 251, 252.) In Cases Nos. 18,475 and 18,477, below, applications for interlocutory injunctions were denied on March 20, 1964. (R. 253, 254.)

Reasons for Granting the Writ

I. The Questions Presented Are Important for the Administration of the Shipping Act and of Regulatory Statutes Generally

Viewed either as an interpretation of the information-gathering powers of the Federal Maritime Commission under Section 21 of the Shipping Act or as an interpretation of the Commission's substantive jurisdiction, the decision below affects the rights of more than 400 common carriers by water serving United States foreign commerce.[3] Most of those carriers are members of one or more of the 120 steamship conferences establishing freight rates in the numerous and diverse trade routes on which that commerce flows. Their vessels fly the flags of all the principal maritime countries of the world and of many of the emerging nations seeking to establish themselves in the maritime field. The increasing extent to which the United States regulatory activity unilaterally burdens ocean-borne commerce among nations is a matter of grave concern to those carriers, to the countries where their vessels are registered, and to the nations whose foreign commerce is also the foreign commerce of the United States.

However, even broader considerations are involved. The ever-increasing scope of intervention by federal

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[3] The Section 21 orders involved in the *Montship* and *Kerr* cases were addressed to more than 400 carriers believed by the Commission's predecessor to be subject to the Shipping Act. [*Montship Lines Limited* v. *Federal Maritime Board*, 111 App. D.C. 160, 295 F.2d 147 (1961); *Kerr S.S. Co.* v. *United States*, 284 F.2d 61 (2nd Cir. 1960), certiorari granted and remanded with directions to dismiss as moot, 369 U.S. 422 (1962)].

agencies into the day-to-day activities of regulated industries is a matter of critical importance to all persons entitled to the protection afforded by the Constitution and the Administrative Procedure Act. As a consequence, there is an urgent need for further definition of the judicially enforceable limits upon the inquisitorial powers of administrative agencies.

II. The Federal Maritime Commission's Demands for Information Relate to Subjects Over Which the Commission Has No Jurisdiction

The decision below extends the authority of the Federal Maritime Commission over the level of international ocean freight rates far beyond that granted by Congress. The present case is an important one, in that it represents the first instance in which this issue has been clearly brought before this Court.

It is submitted that the Court of Appeals misinterpreted the provisions of the Shipping Act, and more particularly those of §18(b)(5), 75 Stat. 765 [46 U.S.C. §817(b)(5)], in holding that "the Commission's concern is not solely with the detrimental effect of rates on the commerce of the United States but also with the reasonableness of rates, to which the information sought is related" (Appendix A, p. 9a).

The Commission's predecessors had noted time and again that the Commission and its predecessors had no authority over the level of international freight rates.[4] Indeed, no efforts were made to control the

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[4] *Boston Wool Trade Association* v. *General S.S. Corp.* (Docket 12) 1 USSB 49, 51 (1923); *Rawleigh* v. *Stoomvaart et al.* (Docket 80) 1 USSB 285, 288 (1933); *Contract Rates—Japan/Atlantic & Gulf Freight Conference* (Docket 730) 4 F.M.B. 706, 734 (1955).

level of such rates in the forty-five years between the enactment of the Shipping Act, 1916, and the passage of Public Law 87-346, amending it.

At the time of the 1961 amendments, several suggestions were put forward for granting to the Commission more specific power to control international ocean freight rates. Such efforts were generally opposed, not merely by those dealing with the bill in Congress, but also by the Department of Commerce and the Federal Maritime Board, the Commission's predecessor. In a letter to the Honorable Herbert C. Bonner, Chairman of the House Committee on Merchant Marine and Fisheries, the Secretary of Commerce wrote as follows [H.R. Rep. No. 498, 87th Cong., 1st Sess. (1961) 20-1; Sen. Doc. No. 100, 87th Cong., 2nd Sess., pp. 131-2, hereinafter referred to as "Index to Legislative History"]:

> "* * * In a single conference it is not unusual to have 20 member lines operating vessels of 10 or 15 different flags, all having different costs of operation, precise information as to which is not in the possession of the Board. For the Board to attempt to fix a single rate or maximum and minimum rates which would be reasonable for all the conference members would, we believe, be impossible."

Similar views were expressed by Senator Engle in debates on the floor of the Senate, when he said:

> "It must be remembered that the United States has no power to export the regulatory procedures of our Government. For instance, we cannot apply a rate structure procedure to foreign lines;

> they simply would not submit to it. I read earlier a list of 12 nations which have made it very plain that they will not put up with the United States establishing a rate procedure such as we have for the railroads, which are all domestic, or for bus lines or for any of the other several types of domestic carriers." (Index to Legislative History, p. 267)

All efforts to introduce control by the Commission over the level of international freight rates were thwarted by Congress in the recent amendments to the Shipping Act, 1916.

The only additional power conferred upon the Commission in 1961 was contained in §18(b)(5) of the Shipping Act. This Section provides for Commission disapproval of rates found, *after hearing,* "to be so unreasonably high or low as to be detrimental to the commerce of the United States". The test under this Section is an empirical one—whether particular rates are in fact "detrimental to the commerce of the United States". Yet nothing in any of the information which the Commission is presently demanding of these Conferences could possibly relate to that issue. The demands, although superficially few, would require an unprecedented searching revelation of the full rate-making practices and procedures of the Conferences, together with an accounting of the results thereof.

The reluctance of the Commission's predecessors as well as Congress to embark upon any rate-making procedures in the delicate area of international ocean transportation can easily be understood. This area is one not readily susceptible to unilateral control by any one nation, while conflicting controls by different

countries would put the ocean carriers and the commerce which they serve in an untenable position. It was clearly for this reason that the governments of friendly maritime nations were so deeply concerned with this legislative proposal. The presence of such highly charged international circumstances was recently noted by this Court in *McCulloch* v. *Sociedad Nacional,* 372 U.S. 10, 21-22 (1963).

The Court of Appeals' tangential reference to §212(e) of the Merchant Marine Act, 1936, 49 Stat. 1990 [46 U.S.C. §1122(f)] is, under the circumstances of this case, entitled to no special attention and rests upon no solid foundation. If the Commission's purposes had been truly related to the making of legislative recommendations, the Commission could easily have so indicated. In such a situation the search for information should have been made applicable to all conferences rather than the few who were privileged to receive the Commission's special favors.

The court below found that the information sought related to the "reasonableness of rates." However, since the determination of the reasonableness of rates, except insofar as "detrimental to commerce", is beyond the Commission's authority, the lower court's decision is based upon a wrong, and seriously wrong, premise.

If the Shipping Act, 1916, as recently amended by §18(b)(5), is correctly construed, the only issue properly open to the Commission's consideration is the effect of rates on the commerce of the United States. This Court emphasized the question of effects rather than of methods in connection with rates in *Federal*

Power Comm'n. v. *Hope Gas Co.*, 320 U.S. 591, 602 (1944). See also *Danville Chamber of Commerce* v. *B. & O. R.R. Co.*, 255 I.C.C. 108, 115.

III. The Commission's Orders Are Unauthorized by §21 of the Shipping Act and Fail to Comply with §6 of the Administrative Procedure Act

The Court of Appeals accepted the respondents' argument that since §21 of the Shipping Act provides a procedure for obtaining documents, the obtaining of such documents is "authorized by law", so that no objections may be made under the Administrative Procedure Act or otherwise. However, the legislative history of the Administrative Procedure Act does not warrant any such pat construction. Rather it shows that §6(b) of that Act, 60 Stat. 240 (5 U.S.C. §1005), directing that no reports be required "for any purpose except as authorized by law", has substantive connotations rather than merely procedural ones.

The Senate Judiciary Committee Print of June, 1945, of the antecedent bill, contained the following "explanation" of the provisions of §6(b) (Sen. Doc. No. 248,[3] p. 27):

> "Many statutes conferring administrative powers contain authorization to conduct investigations, but the same statutes rarely include language indicating that such investigations must

[3] Legislative history materials relating to the Administrative Procedure Act were conveniently compiled in Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946), and our citations in the following discussion are to that document except where additional citations to legislativ materials appear desirable. We refer to the document as Sen. Doc. No. 248.

be confined to the jurisdiction and purposes of the agency to which the authority is delegated. Subsection (b) states the established limitations. Although scattered precedents hold that such investigative powers are necessarily so confined, since otherwise delegations would be unrestrained and therefore unconstitutional, the basic rule should be included in any administrative procedure statute."

So also the Report of House Judiciary Committee on the same bill, H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946), noted as follows:

"This section is designed to preclude 'fishing expeditions' and investigations beyond jurisdiction or authority. It applies to any demand, whether or not a formal subpena is actually issued. It includes demands or requests to inspect or for the submission of reports. An investigation must be substantially and demonstrably necessary to agency operations, conducted through authorized and official representatives, and confined to the legal and factual sphere of the agency as provided by law. Investigations may not disturb or disrupt personal privacy, or unreasonably interfere with private occupation or enterprise. They should be conducted so as to interfere in the least degree compatible with adequate law enforcement."

Finally, during the debates on S.7 on May 24, 1946 (Sen. Doc. No. 248, p. 346), Representative Sabath commented:

"I should like to bespeak special commendation for the discussion of section 6(B), dealing with

> administrative investigation, found on page 23 of the report of the House Committee on the Judiciary. Investigations, the committee says, must not be 'fishing expeditions', and may not disturb or disrupt personal privacy, or unreasonably interfere with private occupation or enterprise. They should be so conducted as to interfere in the least degree compatible with adequate law enforcement."

All this is in support of the protection afforded by the Fourth Amendment to the Constitution of the United States (see *Federal Trade Commission* v. *American Tobacco Company,* 264 U.S. 298, 305-6 (1924)). The Court of Appeals' error in putting a purely procedural construction on Section 6(b) is a fundamental, far-reaching and important one, needing correction by this Court.

IV. The Commission's Orders Contain No Statement of Purpose Sufficient to Permit a Determination of the Relevancy and Reasonableness of the Information Sought

The Court of Appeals' decision amounts to an abandonment of its holdings in *Montship Lines, Ltd.* v. *Federal Maritime Board,* 111 App. D.C. 160, 295 F.2d 147 (1961) and *Hellenic Lines, Ltd.* v. *Federal Maritime Board,* 111 App. D.C. 151, 295 F.2d 138 (1961) requiring a proper statement of purpose. No inherent differences exist as between the present orders and those held to be inadequate in the *Hellenic Lines* case, as a comparison of the two orders shows:

The Present Orders	*Hellenic Lines Order*
"In order that the Commission may be properly informed as to matters bearing upon its responsibilities under these statutory provisions, and to determine what action if any it should take pursuant to such statutory provisions, it is necessary that the conference and the carriers named herein furnish the commission with the information hereinafter specified."	"That pursuant to the responsibilities vested in the Board by the aforementioned Shipping Act, 1916, and in the effectuation in the public interest of the Board's regulatory duties under that Act, the Board needs the reports, accounts, records, rates, charges and memoranda of facts and transactions hereinafter described * * *".

Although the wording may be slightly different, the substance is the same. The Commission merely says that it thinks it needs the information to carry out its statutory duties. It does not appear whether the purpose is to determine whether the law is being obeyed, or to find out whether suspected violations have occurred, or to decide whether a particular rule of general applicability should be issued, or to determine whether certain legislation should be recommended to Congress.

The salutary effect of the Court of Appeals' decision in *Montship* in protecting the carriers there involved from a purposeless production of papers is demonstrated by the history of the case after its decision. There just is no history. In other words, the Commission abandoned the inquiry rather than state its purpose—and this notwithstanding that the Com-

mission had opposed the issuance of an interlocutory injunction on the ground that the public interest urgently required the production of the data.

The point is a serious one, as the Court of Appeals for the District of Columbia Circuit found in the earlier cases. Vague, indefinite and uncertain orders provide no standards against which the relevancy and materiality of the documents requested can be tested. The Conferences fear that, if the Commission is left free to use § 21 for the purpose of creating an impression of busy regulation whenever the thoroughness of its regulation is called into question, they will be subjected to frequent and harassing production requirements wholly unrelated to the exercise of the Commission's lawful functions. The protection of Amendment IV to the Constitution of the United States is an illusion if the courts may properly accept without question the naked assertions of governmental functionaries that they need information sought by compulsory process.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

New York, N.Y.
November 16, 1964

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,468

FAR EAST CONFERENCE, PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

No. 18,471

NORTH ATLANTIC BALTIC FREIGHT CONFERENCE, ET AL.,
PETITIONERS,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

No. 18,475

NORTH ATLANTIC CONTINENTAL FREIGHT CONFERENCE,
ET AL., PETITIONERS,

v.

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

No. 18,477

PACIFIC COAST EUROPEAN CONFERENCE, PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

No. 18,518

FAR EAST CONFERENCE, PETITIONER,

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

Consolidated Petitions for Review of Orders of the Federal Maritime Commission

Decided August 20, 1964

Mr. Elkan Turk, Jr., with whom *Mr. Seymour H. Kligler* was on the brief, for petitioner in Nos. 18,468 and 18,518.

Mr. Burton H. White, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of court, with whom *Mr. Arthur E. Tarantino* was on the brief, for petitioners in Nos. 18,471 and 18,475.

Mr. Charles F. Warren for petitioner in No. 18,477.

Mr. Robert E. Mitchell, Deputy General Counsel, Federal Maritime Commission, with whom Assistant

Attorney General *William H. Orrick, Jr., Messrs. James L. Pimper,* General Counsel, Federal Maritime Commission, and *Irwin A. Seibel,* Attorney, Department of Justice, were on the brief, for respondents.

Before WILBUR K. MILLER, FAHY and WRIGHT, *Circuit Judges.*

FAHY, *Circuit Judge*: Nos. 18,468, 18,471, 18,475 and 18,477 may be considered together. Each case is a petition by one or more steamship Conferences, composed of common carriers by water and organized under agreements approved by the Federal Maritime Commission under Section 15 of the Shipping Act of 1916, as amended, 75 Stat. 763, 46 U.S.C. § 814 (Supp. IV, 1961), to review orders of the Commission issued under the authority the Commission claims by reason of Section 21 of the Act.[1] The orders are not related to any proceeding pending before the Commission on a complaint, but have been issued as part of a

[1] Appeals from similar orders directed to other Conferences and involving different trade routes and commodities were previously filed in the Ninth Circuit. For that reason the Commission contends that this court is required to transfer these proceedings to the Ninth Circuit under 28 U.S.C. § 2112(a). That section provides that when proceedings are instituted in two or more courts of appeals with respect to the same agency order the agency shall file the record in that court in which such proceedings were first instituted and the other courts shall thereupon transfer the proceedings concerning such order to the court in which the record has been filed. We do not think that this section is here applicable; for although the requests for production in the orders involved in these cases and the orders appealed from in the Ninth Circuit are substantially identical, the orders themselves cannot be considered the "same order" within the meaning of the statute. Moreover, assuming that aside from the statute it is within the inherent power of the court to transfer the cases in the interest of sound judicial administration, we do not think that this case is an appropriate one for the exercise of such power since the appeals filed in the Ninth Circuit have already been disposed of by that court.

"Foreign Trade Study" by the Commission. Section 21 authorizes the Commission to

> require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it or him any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath, whenever the Board or Secretary so requires, and shall be furnished in the form and within the time prescribed by the Board or Secretary,

followed by penalty provisions for non-compliance. 39 Stat. 736 (1916), 46 U.S.C. § 820 (1958).

Only Part I of the orders is involved.[2] It requires each Conference, as agent for its common carrier members, to produce at the Commission's offices in Washington, D. C., as follows:

> a. A copy of any letters, memoranda, circulars, and other correspondence or documents exchanged between the conference and any of its common carrier member lines and/or any of their agents, during the period January 1, 1962 through September 30, 1963, relating to rates on any of the commodities listed in Attachment A hereto. Documents which merely list or state such rates without discussion need not be furnished.
>
> b. A copy of any reports, studies, analyses or

[2] Other parts of the orders as originally issued have been suspended by Commission order of February 26, 1964.

documents compiled by or for or received by the conference between January 1, 1959 and September 30, 1963, with respect to all rates charged by the conference. Documents which merely list or state such rates without discussion need not be furnished.

Whenever any of the foregoing information has been otherwise furnished to the Commission, at the request of the Commission, a statement to that effect identifying the matter filed and the time of such filing, may be submitted in lieu of the matter requested.

This request was preceded by a recitation of the requirements of certain provisions of the Shipping Act[3] and a statement that production of the requested data was necessary "in order that the Commission may be properly informed as to matters bearing upon its responsibilities under these statutory provisions, and to determine what action if any it should take pursuant to such statutory provisions. . . ."

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[3] This part of the order reads as follows:

Under various provisions of the Shipping Act, 1916, and the Merchant Marine Act, 1936, the Commission is charged with certain regulatory responsibilities with respect to rates and practices of common carriers in the waterborne foreign commerce of the United States.

Section 15 of the Shipping Act, 1916, requires, among other things, that the Commission disapprove, cancel, or modify agreements found to be unjustly discriminatory or unfair as between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States or to be contrary to the public interest. Section 17 of the Shipping Act, 1916, prohibits common carriers by water in the foreign commerce of the United States from charging rates or fares which are unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign

Accompanying each order was a letter from the Chairman of the Commission stating that certain rates and charges applicable to cargo from certain ports of the United States to certain foreign ports exceeded those applicable to cargo from the foreign ports to ports of the United States, particularly with respect to the commodities listed in Attachment A to the orders; and that the Commission was considering institution of an investigation of the matter pursuant to Section 212(e) of the Merchant Marine Act, 1936, and/or rate proceedings to determine the issue of the detrimental character of the rates within the meaning of Section 18(a)(5) [sic—probably should read "18 (b)(5)"] of the Shipping Act, 1916, as amended. The letter continued,

> Prior to the institution of proceedings pursuant to the aforementioned statutory provisions, and if possible to obviate the necessity therefor, we request that you take immediate steps to make appropriate adjustments in your tariffs, particularly with respect to the rates on the commodities enumerated in Attachment A, or that you submit to the Commission statements setting forth all facts and conditions which explain or justify the higher export rates published by your conference. We

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competitors. Section 18(b)(5) of the Shipping Act, 1916, requires that the Commission disapprove rates found to be so unreasonably high or low as to be detrimental to the commerce of the United States.

Under Section 212(e) of the Merchant Marine Act, 1936, the Commission is required to investigate rates whereby shippers from the United States pay a higher rate from a United States port to a foreign port than the rate charged by the same carrier on similar cargo from such foreign port to such United States port, and to recommend to Congress measures by which such discimination may be corrected.

> request your compliance with the foregoing on or before December 15, 1963. For the purpose of evaluating your statement and determining whether formal proceedings should be instituted, the Commission is also requiring that you furnish the information described in the accompanying order issued pursuant to Section 21 of the Shipping Act, 1916.[4]

The question is whether the orders are valid. We note first the contention, pressed in No. 18,477, that the letter accompanying the order demonstrates that the Commission's purpose was to force a reduction in rates by requiring the Conferences to "reduce or produce", and that such a coercive tactic constitutes an invalid exercise of administrative authority. We can find no such coersive purpose in the combination of the order and the letter since, as we view the matter, the information requested was to be supplied whether or not the letter itself led to the rate adjustments suggested. We have the question whether the orders are valid, not the letters. We cannot hold the orders invalid if, considered apart from the letters, they are within the Commission's authority. *Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139, 145 (1937).

As to this we bear in mind the broad regulatory responsibilities of the Commission, considered with the exemption enjoyed by the Conferences from the

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[4] By orders of March 12, 1964, March 20, 1964, and April 22, 1964, this court denied the applications of petitioners for interlocutory injunctions restraining enforcement of the Commission's orders pending final determination of the petitions to review. The orders of March 12 also dissolved orders previously entered by this court staying the effectiveness of the Commission's orders in Nos. 18,468 and 18,471.

antitrust laws by reason of Commission approval of Conference agreements. See *Isbrandtsen Co.* v. *United States,* 93 U.S. App. D.C. 293, 297, 211 F.2d 51, 55, *cert. denied, Federal Maritime Board* v. *United States,* 347 U.S. 990 (1954). Within these broad responsibilities is lodged the specific authority here sought to be exercised. As to this we cannot accept petitioners' suggestion that Section 21 orders must be limited to complaint proceedings. They are available to aid investigation without the need for the support of a charge of violation of the Act, or belief even that such a violation is probable. *Isbrandtsen-Moller Co.* v. *United States, supra* at 144. In this respect the discussion by the Supreme Court in *United States* v. *Morton Salt Co.,* 338 U.S. 632, 652 (1950), is applicable, though that case involved the investigatory powers of the Federal Trade Commission and not of the Maritime Commission. And see *Pacific Westbound Conf.* v. *United States,* — F.2d — (9th Cir. 1964). *Cf. Montship Lines, Ltd.* v. *Federal Maritime Board,* 111 U.S. App. D.C. 160, 166, 295 F.2d 147, 153 (1961).

We need not discuss whether or not the data demanded, if the demand is otherwise valid, is of the type obtainable under Section 21, namely, "any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this Act"; for petitioners accept the view of the Commission in this respect. At least they do not dispute it in these cases, no doubt in part because of the views expressed by this court in *Montship, supra,* as to the broad construction to be

given the enumeration in Section 21 of the kind of data the Commission may require.[5]

There is a contention, however, that a Conference is not an entity to which a Section 21 order may be applied. That section is applicable to "any common carrier by water" or "other person subject to this Act," or "any officer, receiver, trustee, lessee, agent or employee" thereof. The fact is that the Conferences are in many respects agents of the carriers which compose them. If the Conferences are in possession of the data, and the data is otherwise validly sought, it may not be refused on the theory the Conferences are not answerable to a Section 21 order.

Petitioners also contend that the orders are invalid because the data sought is not reasonably related to the Commission's statutory authority over rates in foreign commerce. They claim that the Commission's only source of control over such rates is Section 18(b)(5) which requires Commission disapproval of rates found "to be so unreasonably high or low as to be detrimental to the commerce of the United States," and under this limited statutory authority the Commission is concerned only with the effect of rates, not with the rate-making processes to which the requested data relates. As we read the statute, however, the Commission's concern is not solely with the detrimental effect of rates on the commerce of the United States but also with the reasonableness of rates, to which the information sought is related. We have in mind also the command of Section 212(e) which di-

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[5] Petitioners, however, do contend that an order "to produce" is not authorized by Section 21 since that section literally requires a carrier only "to file" the requested data. Whatever the difference between producing and filing, we think this contention was disposed of by this court's opinion in *Montship, supra*.

rects the Commission to investigate disparities between import and export rates and to recommend to Congress measures by which such discrimination may be corrected.

A principal argument of petitioners is based on the decisions of this court in the *Montship* case, and in *Hellenic Lines, Ltd.* v. *Federal Maritime Board,* 111 U.S. App.D.C. 151, 295 F.2d 138 (1961), which held the Section 21 orders then before the court to be invalid because they were set forth in such general terms that no standard existed by which to determine the relevancy of the information demanded, a defect which bore upon the reasonableness of the orders. Here, however, the purposes are set forth with reference to particular sections of the statute and the need of the Commission for the information in order "that the Commission may be properly informed as to the matters bearing upon" the responsibilities imposed upon it by the sections thus referred to. This is clearly an effort by the Commission to meet the defect pointed out in our *Montship* and *Hellenic Lines* decisions, and, like the Ninth Circuit in its recent decision in *Pacific Westbound,* we think the effort has succeeded and that the stated purposes of the order show the relevancy of the data sought. The requirements to be met in the investigatory area of administrative agencies, stated in general terms in the *Morton Salt* case, seem to us to be satisfied in this case:

> [I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. 338 U.S. 632, 652.

A word now as to the possible oppressiveness of the demand to produce, that is, the difficulty of compliance

in relation to the need of the Commission to obtain the information. We have no basis in the record for finding oppressiveness. We rely upon the prudence and reasonableness of the Commission in cooperating with the Conferences in the manner of complying. *Cf. United States* v. *Morton Salt Co., supra* at 653.

No. 18,518. Aside from matters above disposed of, in this case Far East Conference challenges a Section 21 order demanding the data which is described in the copy of the order which is set forth as an Appendix to this opinion. As appears therefrom the data demanded relates to requests and complaints of shippers. Section 15 of the Shipping Act of 1916 was amended in 1961, 75 Stat. 764, 46 U.S.C. § 814 (Supp. IV, 1961), by adding a provision as follows:

> The Commission shall disapprove any such [Section 15] agreement, after notice and hearing, on a finding of . . . failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

The order recites that the Commission needs the data sought so as to be adequately informed as to matters bearing upon its responsibilities under this statutory provision. The objection of petitioner is that the statute vests authority in the Commission with respect to reasonable procedures for hearing and considering shippers' requests and complaints, whereas the order seeks data not as to procedures but as to requests and complaints made, and action taken in connection therewith. But it seems quite clear to us that the Commission in ascertaining whether or not the Conference has adopted and is maintaining reasonable procedures respecting requests and complaints of

shippers is entitled to find out what requests and complaints have been made and what disposition has been made of them. The information requested is designed to inform the Commission as to this.

In all the cases we have not neglected to consider Section 6(b) of the Administrative Procedure Act, 60 Stat. 240 (1946), 5 U.S.C. § 1005(b) (1958), limiting an agency in demanding reports and making investigations except as the agency may be authorized by law. Being of opinion that the orders are authorized by law, it follows we find Section 6(b) no bar to them.

Affirmed.

Circuit Judge WILBUR K. MILLER dissents.

APPENDIX

Section 21 Order

STUDY—CONFERENCE PROCEDURES FOR HEARING AND CONSIDERING SHIPPERS' REQUESTS AND COMPLAINTS

Section 15 of the Shipping Act, 1916, requires, among other things that the Commission disapprove any agreement between parties subject to that Act on a finding of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

In order that the Commission may be adequately informed as to matters bearing upon its responsibilities under this statutory provision, and to determine what action, if any, it should take under this provision, it is necessary that the conference named herein furnish the Commission with the information hereinafter specified.

Now THEREFORE, pursuant to the authority vested in it under Section 21 of the Shipping Act, 1916, the Commission hereby orders THE FAR EAST CONFERENCE (Agreement No. 17), as agent for each of the member lines thereof, to produce at the Commission's offices in Washington, D. C., not later than January 22, 1964 the following:

1. A copy, or if oral, a complete statement of each request and/or complaint filed during the period July 1, 1963 to December 31, 1963; inclusive.

2. Copies of all interim correspondence and memoranda including all inter-office memoranda and correspondence between the conference and carriers and any report or studies pertaining to each individual request and/or complaint mentioned in Paragraph 1 above.

3. A copy, or if oral, a complete statement of each notice to shippers advising of actions taken in connection with such requests and complaints.

4. A brief resume to accompany the above setting forth the date received, the name and address of the party, the nature of the request or complaint, the date of disposition, the method of disposition, and if denied, the reason for such denial.

Whenever any of the foregoing information has been otherwise furnished to the Commission, at the request of the Commission, a statement to that effect, identifying the matter filed and the time of such filing, may be submitted in lieu of the matter requested.

By Commission December 27, 1963

Francis C. Hurney
for Thomas Lisi
Secretary

APPENDIX B

Constitutional and Statutory Provisions Involved

I. Amendment IV to the Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

II. Sec. 15, Shipping Act, 1916, 39 Stat. 733, as amended by 75 Stat. 763 (46 U. S. C. §814):

That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative

working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 14b of this Act which do not involve a change in the spread between such rates and charges and the rates and charges applicable to non-contract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 18(b) hereof and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 14b, shall be excepted from the provisions of the Act approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", and amendments and Acts supplementary thereto, and the provisions of sections 73 to 77, both inclusive, of the Act approved August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 14b shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

III. Sec. 17, Shipping Act, 1916, 39 Stat. 734 (46 U. S. C. §816):

That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

IV Sec. 18(b)(5), Shipping Act, 1916, as amended, 75 Stat. 765 (46 U. S. C. §817(b)(5)):

(5) The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unrea-

sonably high or low as to be detrimental to the commerce of the United States.

V. Sec. 21, Shipping Act, 1916, 39 Stat. 736 (46 U. S. C. §820):

That the board may require any common carrier by water, or other person subject to this Act, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this Act. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the board. Whoever fails to file any report, account, record, rate, charge or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

Whoever willfully falsifies, destroys, mutilates, or alters any such report, account, record, rate, charge, or memorandum, or willfully files a false report, account, record, rate, charge or memorandum shall be guilty of a misdemeanor, and subject upon conviction to a fine of not more than $1,000, or imprisonment for not more than one year, or to both such fine and imprisonment.

VI. Sec. 212(e) Merchant Marine Act, 1936, 49 Stat. 1990 (46 U. S. C. § 1122(f)):

Sec. 212. The Commission is authorized and directed:

* * *

(e) To investigate under the regulatory powers transferred to it by this Act, any and all discriminatory rates, charges, classifications, and practices whereby exporters and shippers of cargo originating in the United States are required by any common carrier by water in the foreign trade of the United States to pay a higher rate from any United States port to a foreign port than the rate charged by such carrier on similar cargo from such foreign port to such United States port, and recommend to Congress measures by which such discrimination may be corrected.

VII. Sec. 2 of the Judicial Review Act (Federal Agencies, 64 Stat. 1129, as amended (5 U. S. C. §1032):

The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in accordance with the provisions of section 402(a) of the Communications Act of 1934, as amended, and (b) of the Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and under the Perishable Agricultural Commodities Act, 1930, as amended, except orders issued under sections 309(e) and 317 of the Packers and Stockyards Act and section 7(a) of the Perishable Agricultural Commodities Act, and (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Admin-

istration entered under authority of the Shipping Act, 1916, as amended, and the Intercostal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended, and (d) of the Atomic Energy Commission made reviewable by section 189 of the Atomic Energy Act of 1954, as amended.

Such jurisdiction shall be invoked by the filing of a petition as provided in section 4 hereof.

VIII. Sec. 4 of the Judicial Review Act (Federal Agencies), 64 Stat. 1130 (5 U. S. C. §1034):

Any party aggrieved by a final order reviewable under this Act may, within sixty days after entry of such order, file in the court of appeals, wherein the venue as prescribed by section 3 hereof lies, a petition to review such order. Upon the entry of such an order, notice thereof shall be given promptly by the agency by service or publication in accordance with the rules of such agency. The action in court shall be brought against the United States. The petition shall contain a concise statement of (a) the nature of the proceedings as to which review is sought, (b) the facts upon which venue is based, (c) the grounds on which relief is sought, and (d) the relief prayed. The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition upon the agency and upon the Attorney General of the United States by mailing by registered mail, with request for return receipt, a true copy to the agency and a true copy to the Attorney General.

IX. Sec. 10 of the Judicial Review Act (Federal Agencies) 64 Stat. 1132, (5 U.S.C. §1040):

An order granting or denying an interlocutory injunction under section 1039(b) of this title shall be subject to review by the Supreme Court of the United States upon writ of certiorari as provided in section 1254(1) of Title 28: Provided, That application therefor be duly made within forty-five days after the entry of such order. The final judgment of the court of appeals in a proceeding to review under this chapter shall be subject to review by the Supreme Court of the United States upon a writ of certiorari in accordance with the provisions of section 1254(1) of Title 28: Provided further, That application therefor be duly made within ninety days after the entry of such judgment. Either the United States or the agency or an aggrieved party may file such petition for a writ of certiorari. The provisions of section 1254(3) of Title 28, regarding certification, and of section 2101(e) of Title 28, regarding stays, shall also apply to proceedings under this chapter.

X. Sec. 6(b) of the Administrative Procedure Act, 60 Stat. 240 (5 U. S. C. §1005):

(b) INVESTIGATIONS—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

* * *